No. 83-6021

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IN THE

Supreme Court of the United States

October Term, 1983

ALAN N. ROGERS,

Appellant,

v.

TIMOTHY SCOTT FARQUAR,

Appellee.

On Appeal From The Supreme Court Of California

MOTION TO DISMISS APPEAL OR AFFIRM

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MOTION TO DISMISS APPEAL OR AFFIRM

Appellee moves that the appeal herein taken be dismissed on the ground that the United States Supreme Court does not have jurisdiction under 28 U.S.C. 1257(2); the appeal does not present a substantial federal question; the federal question sought to be reviewed was not timely or properly raised; and the judgment rests on an adequate non-federal basis; or alternatively that the judgment be affirmed.

STATEMENT OF THE CASE

On November 5, 1979, appellant filed a complaint for damages in the Superior Court for the County of San Diego, State of California, alleging he had been falsely imprisoned by appellee, a City of San Diego Police Officer.

On June 2, 1982, after a court trial, the Court awarded judgment in favor of appellee. The Court found that probable cause existed for appellee to take appellant into custody for a violation of Title 18 United States Code Section 876, California Penal Code Section 415(2), San Diego Municipal Code Section 59.5.0501, and California Welfare and Institutions Code Section 5150. The trial court additionally found that appellee was immune from liability pursuant to California Government Code Sections 856 and 855.8.

On August 12, 1983, the Court of Appeal, Fourth Appellate District, Division One, affirmed the decision of the trial court. On August 31, 1983, the Court of Appeal, Fourth Appellate District, Division One, denied appellant's petition for rehearing. On October 5, 1983, the California Supreme Court denied hearing without opinion.

LACK OF JURISDICTION

Appellant attempts to invoke the jurisdiction of this Court under 28 U.S.C., Section 1257(2). However, from the decision of the Court of Appeal, Fourth Appellate District, Division One (appellant's jurisdictional statement p. 32), and appellant's statement of the question presented by the appeal, it is apparent that in the proceedings below a state statute was not upheld upon an attack of being repugnant to the United States Constitution.

In fact, appellant never directly contended below that California Government Code Sections 855.8 and 856 had the effect of violating his constitutional rights. Nonetheless, for jurisdiction to lie under 28 U.S.C.

Section 1257(2), the decision appealed from must have passed on the validity of the statute. *Wilson v. Cook,* 327 U.S. 474, 481, 90 L.Ed. 793 (1945). Something more than a claim of federal right is necessary; the attack must be upon the *validity* of the order, not merely upon the Court's judgment. *Live Oak Water Users' Association v. Railroad Commission*, 269 U.S. 354, 357, 70 L.Ed. 305 (1925).

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Though appellant concludes that California Government Code Sections 855.8(a) and 856 are repugnant to the Fourth Amendment of the United States Constitution he cites no authority to show that a violation of the Fourth Amendment automatically entitles appellant to money damages in a false imprisonment lawsuit under California tort law. Accordingly, he has failed to present a substantial federal question.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED

In his cause of action for false imprisonment or false arrest, appellant failed to raise the issue of whether California Government Code Sections 855.8(a) and 856 are repugnant to the Constitution in any of the proceedings below. Consequently, his current challenge is not timely or properly raised.

THE JUDGMENT RESTS ON AN ADEQUATE NONFEDERAL BASIS

The underlying cause of action for the proceedings below is for false imprisonment or false arrest under California law. The trial court, under California law, awarded judgment in favor of appellee when the Court found that probable cause to arrest appellant existed under California Penal Code Section 415(2), Title 18 U.S.C. Section 876 (sending threats

through the mail), San Diego Municipal Code Section 59.5.0501, and California Welfare and Institutions Code Section 5150. (Appellant's jurisdictional statement pp. 27-31.)

The Court should therefore dismiss this appeal as the decision is based upon state law rather than a federal question. *Copperweld Steel Co. v. Industrial Com.*, 324 U.S. 780, 785, 89 L.Ed. 1363 (1944).

CONCLUSION

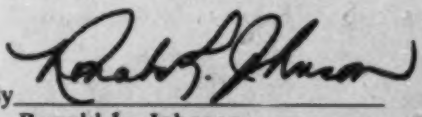
Appellant asks this Court to note probable jurisdiction in order to argue issues of federal constitutional law where those issues were not the basis of the judgment below, where no substantial federal question is involved, where the federal issues and question sought to be reviewed were not timely or properly raised, where the judgment below rests on an adequate nonfederal basis, and where no statute has been adjudged valid below.

The appeal should be dismissed or the decision below affirmed.

Dated: January 20, 1984.

Respectfully submitted,

JOHN W. WITT, City Attorney

By 

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